

## **WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY**

Guidance on Improving the Process for  
Preparing Efficient and Timely  
Environmental Reviews under the National  
Environmental Policy Act

76 Fed. Reg. 77,492 (December 13, 2011)

CEQ Initiative to  
Modernize and Reinvigorate NEPA

## **COMMENTS OF THE ENVIRONMENTAL LAW & POLICY CENTER**

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## **OVERVIEW AND SUMMARY OF COMMENTS**

The Environmental Law & Policy Center (ELPC) appreciates the opportunity to comment on the Council's draft Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act. ELPC supports CEQ's goal of improving the NEPA review process through preparation of timely and efficient environmental reviews that, at the same time, comprehensively evaluate and fully and fairly analyze the environmental impacts and issues presented by proposed actions.

The goal here should be better information, rather than less information. More timely and better organized and coordinated information, rather than flooding the record with lots of scattered information at different times. More available and accessible information through coordinated and effective use of web tools, rather than just more pages from more different places. CEQ must ensure that its Guidance is not misinterpreted as encouragement for agencies to just provide less information to the public regarding their rationale for decisions or as justification for providing fewer opportunities for the public to comment on proposed actions.

ELPC recommends five specific areas in which CEQ should consider clarifying its Guidance in order to ensure that the goals of NEPA are properly implemented, as summarized here and described in more detail below:

1. Information included in NEPA documents should continue to be sufficient for the public to understand the agency's decision-making rationale.
2. Agencies should not sacrifice accuracy for efficiency when utilizing other agencies' Environmental Impact Statements or portions thereof.
3. Scoping should not be used to somehow constrain the public from later commenting on proposed actions.
4. Environmental reviews should be conducted early in the project development process but, in most cases, not until after there are reasonable assurances of project funding and financing.
5. CEQ should encourage agencies to set appropriate NEPA review timelines, but should clarify that no timeline should be so rigid as to jeopardize a proper full and fair environmental review both as a matter of substance and process.

### **I. INFORMATION INCLUDED IN NEPA DOCUMENTS SHOULD CONTINUE TO BE SUFFICIENT FOR THE PUBLIC TO UNDERSTAND THE AGENCY'S DECISION-MAKING RATIONALE.**

ELPC agrees with CEQ that environmental analysis should focus on issues and comments in proportion to their environmental significance. However, more efficiency cannot be a justification for insufficient or too-limited analysis. The public must be able to understand how and why an agency is proposing its preferred alternatives and decisions. Otherwise, the public will be constrained in providing meaningful comments on whether the agency's rationale was

correct or whether the agency should have considered the information in a different manner that might result in a different conclusion.

CEQ should be clear in its Guidance that proportional analysis means that significant issues require more meaningful discussion both in agency documents and in responses to comments, not simply that insignificant issues can be discussed in less depth than the agency would have otherwise. We recommend that CEQ replace its current sentence on page 4 of the draft Guidance: “Impacts should be discussed in proportion to their significance, and if the issues are not deemed significant there should only be enough discussion to show why more study is not warranted.” with the following text:

“Impacts should be discussed in proportion to their significance, which means that if issues are deemed significant, there should be a substantial and meaningful discussion of impacts. If issues are not deemed significant, there should be only enough discussion to demonstrate that more study is not warranted.”

ELPC also suggests adding the phrase “and providing a meaningful discussion of important issues” at the end of CEQ’s first sentence in item 8 on page 12.

While we agree that there is a range of appropriate lengths for EISs, CEQ should be clear that agencies must discuss all pertinent issues in a comprehensive manner. We recommend adding the following language after “The CEQ Regulations...normally be less than 300 pages” on page 5 of the draft Guidance:

“However, agencies must still address all relevant issues in a comprehensive, full and fair manner, and should use the space necessary to do so, while embodying the principles of efficiency expressed in this Guidance.”

CEQ should also be clear that while efficiency might dictate proportionality in agencies’ discussion of issues, agencies must still address all possible environmental concerns in at least enough detail for the public to understand why the agency considers certain issues more important than others. If an agency rejects a potential environmental issue as insignificant to its ultimate decision, either because the agency does not consider the issue to be a factor scientifically or because the agency considers the issue to be outweighed by other concerns, the agency must provide an adequate explanation of its rationale and enough information for the public to understand how the agency reached its conclusion.

ELPC suggests adding the following sentence after “[I]f the issues are not deemed significant there should only be enough discussion to show why more study is not warranted.” on page 4 of the draft Guidance: “That discussion should provide enough information for the public to understand and intelligently comment on the agency’s rationale.”

CEQ should also be more specific as to what it means on page 12 of its draft Guidance to make materials “reasonably available for inspection” when an agency incorporates materials by reference in its EIS. Such materials should be readily available so that the public can see what the agency relied on in making its decision. ELPC suggests that CEQ add the following sentence

after “reasonably available for inspection by potentially interested persons within the time allowed for comment” on page 12:

“To ensure that their documents are reasonably available, agencies should provide links to the incorporated materials in the same location where the EIS or EA can be found online.”

## **II. AGENCIES SHOULD NOT SACRIFICE ACCURACY FOR EFFICIENCY WHEN UTILIZING OTHER AGENCIES’ ENVIRONMENTAL IMPACT STATEMENTS OR PORTIONS THEREOF.**

CEQ should clarify its statement on page 11 of the Draft Guidance that agencies can adopt EISs, EAs or portions thereof written by other agencies by ensuring that such adoption is only used on the same project for which the other EIS was prepared. Otherwise, agencies could potentially use data which was not directly related to their project and/or out-of-date to justify their decision. This would violate NEPA’s requirement that agencies use up-to-date science and would fail to truly assess the impacts on the proposed project area. 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1502.24.

ELPC suggests adding the following language at the end of the first paragraph in the “Adoption” section on page 11: “Agencies should only adopt EISs or EAs for the same project for which the other agency’s document was made. When an agency adopts another EIS or EA, it must include sufficient discussion of why the adopted document is relevant to its own project so that the public can understand and comment on the agency’s adoption decision.”

## **III. SCOPING SHOULD NOT BE USED TO SOMEHOW CONSTRAIN THE PUBLIC FROM LATER COMMENTING ON PROPOSED ACTIONS.**

ELPC agrees with CEQ that the scoping process is important because it provides an opportunity for interested individuals to comment on the agency proposal in its earliest stages and identify issues in advance that can defuse some conflicts that might have arisen later. However, the scoping process cannot be used in a manner that removes public participation from the rest of the NEPA process.

CEQ states at pages 4–5 of the draft Guidance that “Environmental analysis should focus on significant issues, discussing insignificant issues only briefly. . . .Scoping, incorporation by reference and integration of other environmental analyses are additional methods that may be used to avoid redundant or repetitive discussion of issues.” This language could be read by some to imply that once an issue is discussed in scoping, if the agency deems that issue to be insignificant, then it need not be discussed again in the NEPA process. If an agency opted not to discuss an issue after its scoping comments on the basis of CEQ’s draft Guidance, it would effectively move up the time period in which a group or individual must comment on a proposed action in order to have standing to challenge the final administrative decision under NEPA’s exhaustion requirement.

Moreover, the agency would end up limiting the amount of participation that could occur on a given issue, thereby constraining effectiveness of public engagement in NEPA's environmental review process.

We recommend that CEQ replace its current sentence at pages 4–5 of the draft Guidance: “Scoping, incorporation by reference, and integration of other environmental analyses are additional methods that may be used to avoid redundant or repetitive discussion of issues” with the following text:

“Scoping may be used to determine which issues are most important and to engage and obtain public input on such issues early on. Incorporation by reference and integration of other environmental analyses may be used to avoid redundant or repetitive discussion of issues.”

CEQ should also clarify its statement on page 9 that “a lead agency preparing [] an EA may use scoping to identify and eliminate from detailed study the issues that are not significant or that have been covered by prior environmental review.” When an agency decides to eliminate an issue from further study as insignificant, it must still provide enough information for the public to understand the decision and provide an adequate opportunity for public comment. ELPC suggests adding the following language after the sentence discussed at the beginning of this paragraph:

“When an agency seeks to eliminate an issue from detailed study, it should include its rationale for doing so either in the EA or in appendices to the EA so that its decision may be subject to public comment.”

#### **IV. ENVIRONMENTAL REVIEWS SHOULD BE CONDUCTED EARLY IN THE PROJECT DEVELOPMENT PROCESS BUT, IN MOST CASES, NOT UNTIL AFTER THERE ARE REASONABLE ASSURANCES OF PROJECT FUNDING AND FINANCING.**

ELPC agrees with CEQ's focus on integrating environmental reviews in the earlier stages of the project development process. At the same time, however, we also believe that a powerful means of enhancing both agency cost savings and environmental protection is to ensure that environmental reviews do not begin *too* soon. In practice this means that the agency must balance the advantages that come from early integration of environmental review with the advantages that come from delaying review until a project, in fact, has a reasonable prospect of moving forward in the near future. Otherwise, the time and money spent on the NEPA environmental review can be premature, based on what becomes stale information and outdated data, and, at worst, wasteful. The optimal time for commencing a NEPA review maximizes environmentally aware decision-making and minimizes unnecessary costs and delay. In most cases, the optimal time for commencing a NEPA review is *after* there are reasonable assurances that project financing and funding is obtained and moving forward. We urge CEQ to offer final guidance that moves away from solely focusing on early integration of NEPA review.

There are several negative consequences when an agency begins NEPA review too soon for projects with shaky prospects of being funded. As ELPC's Executive Director explained in a

memorandum requested by the President's Council on Jobs and Competitiveness:

Too often, the NEPA review is treated as an initial step for project approval that must be overcome before moving on to "more important" project design and financing steps. Thus, significant resources can be devoted to completing environmental review documents before there are adequate assurances that the project has the necessary financing to proceed. If project funding falls through or is delayed, the NEPA documents may become stale and must be updated or redone with additional delay and expense. Project sponsors should be required to have confirmed funding commitments in place before commencing the environmental review in order to avoid wasting resources. This would make the NEPA review and environmental permitting process more efficient and timely.

Transportation projects are one particular area where Guidance on the need for reasonably assured funding could improve effectiveness and reduce the number of premature and less effective NEPA reviews. United States Department of Transportation Secretary Ray LaHood has made this point in the context of highway and other transportation projects. In the Midwest, we are aware of too many cases of proposed transportation projects whose boosters used an early environmental review as a jumpstart in the absence of reasonable assurance of funding and financing. We concur with Secretary LaHood's comments that U.S. DOT must work to eliminate "unnecessary sequencing of environmental studies." *See* Ray LaHood, *Regulatory review at DOT off to a good start, with more results to come*, Fast Lane: The Official Blog of the U.S. Secretary of Trans. (May 26, 2011, 7:42 AM), <http://fastlane.dot.gov/2011/05/regulatory-review.html>. One such "unnecessary sequence" is conducting an environmental review of a project without adequate assurance of funding.

CEQ should encourage agency prudence and efficiency in this Guidance document by supplementing the language on early NEPA review integration. On page 6 of the draft Guidance, we recommend adding the following language after the sentence containing footnote 30:

"At the same time, NEPA planning should not proceed until a project has a reasonable assurance of adequate funding and financing. Such caution is acceptable under our interpretation of the CEQ Regulations and a wise use of the agency resources necessary for NEPA reviews."

This language will encourage a better balance of early integration of the NEPA process with reasonable assurances that a particular project will actually be funded and financed.

**V. CEQ SHOULD ENCOURAGE AGENCIES TO SET APPROPRIATE NEPA REVIEW TIMELINES, BUT ALSO SHOULD CLARIFY THAT TIMELINES NOT BE SO RIGID AS TO JEOPARDIZE A PROPER FULL AND FAIR ENVIRONMENTAL REVIEW BOTH AS A MATTER OF SUBSTANCE AND PROCESS.**

In item 9 of the draft Guidance, CEQ encourages agencies to set clear time limits that are "appropriate...for individual actions." ELPC does not disagree with this goal, but the Guidance

leaves too many questions unanswered as to the substance and nature of “appropriate” time limits. The final Guidance should more fully discuss CEQ’s interpretation of how the regulations govern NEPA review timelines.

We suggest considering and elaborating on several interrelated questions: Are time limits binding on the agency or another party once they have been set? If the regulations give the agency authority to set a time limit based on the regulations’ enumerated factors, does the public have input into this agency decision? What happens if an agency does not meet a previously established deadline?

Our concern is that the draft Guidance could be utilized as deferential authority by an agency looking to hide behind a rigid timeline as an excuse for not considering a relevant alternative, scientific study or other piece of information that couldn’t be obtained within a preset time limit. If timelines are carefully thought out with an opportunity for public input on their length, our concern may only infrequently come to pass. But the Guidance as written does not provide enough discussion of the concept and leaves us concerned about its misinterpretation by agencies.

We urge CEQ to clarify what an “appropriate” timeline consists of, at a minimum, and ELPC suggests adding the following language on page 13 of the draft Guidance at the end of item 9, “Clear Time Lines for NEPA Reviews”: “However, in setting timelines for both EIS and EA processes, it is inappropriate for an agency to justify an incomplete NEPA review on the basis of an overly rigid timeline.”

## **CONCLUSION**

NEPA is a vital tool for protecting our nation’s environmental heritage and ensuring careful, full and full reviews of major federal actions’ environmental impacts. ELPC believes in a reinvigorated and strong NEPA review process. We support CEQ’s overall approach in issuing this Guidance, but believe that CEQ can improve the Guidance by incorporating the changes suggested above. Our comments are directed toward making the Guidance both clearer and more useful to agency decision-makers as well as ensuring that NEPA’s goals are not sacrificed in the name of greater efficiency. Thank you for your consideration of these comments and for the work that CEQ is undertaking to improve the NEPA process.